SUPREME COURT, U.S.
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No. ——

IN THE
Supreme Court of the United States

PAUL GONZALES, SR. AND ELIZABETH GONZALES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD G. GONZALES, DECEASED,
Petitioners,

v.

THE CITY OF KERRVILLE, TEXAS AND DONALD H. BUNCH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

LES MENDELSOHN *
RICKY J. POOLE
LES MENDELSOHN & ASSOCIATES, P.C.
1100 Weston Centre
112 East Pecan Street
San Antonio, Texas 78205
(210) 222-2271
Attorneys for Petitioners

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

A jury found that the City of Kerrville, Texas was deliberately indifferent through its failure to train its officers in the use of deadly force. The jury further found a direct causal connection between the city's deliberate indifference and the deprivation of Edward Gonzales's constitutional rights.

Is a municipality relieved of all culpability for its failure to train subordinate officers in the implementation and use of deadly force simply because one individual officer, who acted in furtherance of the city's unconstitutional policy, is himself absolved of liability for firing the fatal shot?

PARTIES TO THE PROCEEDING

Petitioners:

Paul Gonzales, Sr., Elizabeth Gonzales and The Estate of Edward G. Gonzales, by and through their attorneys of record, Les Mendelsohn and Ricky J. Poole, Les Mendelsohn & Associates, P.C., 1100 Weston Centre, 112 East Pecan Street, San Antonio, Texas 78205.

Respondents:

The City of Kerrville, Texas and Donald H. Bunch, by and through their attorneys of record, Charles S. Frigerio, Law Offices of Charles S. Frigerio, 111 Soledad, Suite 840, San Antonio, Texas 78205.

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PETITION FOR A WRIT OF CERTIORARI

Paul Gonzales, Sr. and Elizabeth Gonzales, Individually and as Personal Representatives of the Estate of Edward G. Gonzales, petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit affirming the trial court's determination (1) to disregard the jury's finding that The City of Kerrville deprived Edward Gonzales of his constitutional rights and (2) to enter a take nothing judgment in favor of The City of Kerrville and Donald H. Bunch.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix ["App."] 1a-7a), entered on December 20, 1999, is unreported. The court of appeals' order denying panel rehearing and rehearing *en banc* (App. 9a-10a) entered on January 24, 2000 is also not published. The judgment of the Honorable H.F. Garcia, United States District Judge, Western District of Texas, San Antonio Division (App. 8a), entered on August 25, 1998 is similarly non-published.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, in that the appeal followed a judgment that disposed of all claims raised in the trial court. The court of appeals' decision was entered on December 20, 1999. Panel rehearing and rehearing *en banc* was denied on January 24, 2000. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. Const. amend. IV.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

> law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case presents the following question upon which the circuit courts disagree and this Court has yet to resolve:

> Should a jury finding that a municipality intentionally deprived an individual of his constitutional rights by failing to adequately train its police officers be disregarded by the trial court because of the additional jury finding that a subordinate police officer who inflicted the actual injury did not independently deprive the individual of his constitutional rights.

EDWARD GONZALES was shot and killed by DONALD H. BUNCH, a sniper/counter-sniper employed by THE CITY OF KERRVILLE'S Police Department, on October 29, 1994 in Kerrville, Texas. At the time of his death, EDWARD was eighteen (18) years old and the son of PAUL and ELIZABETH GONZALES. A lawsuit was filed on September 20, 1996, against THE CITY OF KERRVILLE (hereinafter "CITY") and DONALD H. BUNCH (hereinafter "BUNCH") by PAUL GONZALES, SR. and ELIZABETH GONZALES (hereinafter "GONZALES FAMILY"), following the death of their son.

1. Initial Disturbance Call.

The CITY Police Department dispatcher received notice by telephone that gunshots were being fired from the Upper Guadalupe River Authority (UGRA) Dam by an unknown shooter. The unknown shooter was later identified as EDWARD, who was on the dam, randomly firing his .22 long rifle, without a scope, at various objects. The jury heard testimony that it was common for calls to come in to the police dispatcher regarding inci-

dents on the Guadalupe River or on the dam, including complaints of rifle shots in that area. In response to a dispatch from the CITY Police Department, police officers from the CITY, Kerr County and the Texas Department of Public Safety arrived at the UGRA Dam and took up various positions. Sergeant William Fackelman, a CITY officer, was commander on the scene.

2. Sniper Contacted.

BUNCH was contacted at his home by the police dispatcher at approximately 9:45 p.m. and understood that he was being called out as a counter-sniper. He dressed in camouflage fatigues and put on a bullet-resistant vest. BUNCH arrived on the scene at 10:06 p.m. Upon arrival, BUNCH was told by Fackelman that EDWARD had been pointing the gun in their general direction and to "lie down." BUNCH stayed on the ground until he was motioned by Fackelman. He also heard FACKELMAN state that EDWARD was "crossing the water." Although BUNCH expected to be briefed by Fackelman on the current situation and his role as a sniper, Fackelman provided him with no additional information. The only other information BUNCH learned prior to the shooting was that the suspect's name was Eddie and that he was angry at a family member.

3. Edward Shot by Sniper.

Two and one-half minutes elapsed between the time that Fackelman stated that EDWARD was crossing the water and the moment BUNCH shot EDWARD in the chest.

4. The City's Failure to Train.

THE CITY OF KERRVILLE had no general order regarding the utilization of a sniper in October, 1994. Other cities did have written policies on the use and deployment of a sniper, and expert testimony supported

the GONZALES FAMILY'S position that the CITY'S failure to have such a policy was a deviation from the standard followed in Texas. The CITY had no written policy on chain of command or continuum of force. The CITY had provided no formal training to Fackelman regarding the use of a sniper as part of a response team. The CITY had provided no training to BUNCH on the proper procedure when confronted with an emotionally disturbed person such as EDWARD. The CITY had no written policy recognizing the need for a coordinated response team equipped to respond to a situation such as the one that occurred on October 29, 1994 and had provided no training to educate police officers to work together as a response team.

On October 29, 1994, Joseph Lanning was the police negotiator for the CITY. Officer Lanning had been called at his home at approximately 10:00 p.m. According to Lanning "[i]t's my understanding they called me out as a negotiator." Lanning was aware of no training by the CITY which required the person in command—in this case Fackelman—to speak with the negotiator in order to learn how to defuse as opposed to escalate a situation such as that which confronted the CITY on October 29, 1994. This was true even though the CITY had prior experiences with crisis situations requiring the skills of a negotiator. Lanning learned via radio transmission at 10:12 p.m. that EDWARD had been shot. He had not yet arrived on the scene.

The CITY refused an attack dog offered by the Kerr County Sheriff's Department. Ms. Frances Kaiser, Sheriff of Kerr County, offered "Echo," a dog purchased and trained by the county. The CITY had previously worked with Kerr County in using the dog. A prior trainer of Echo, Steven Nicely, testified that Echo was a "very high drive dog," fully capable of being utilized on the dam that

night to neutralize the threat posed by EDWARD. Nicely testified that EDWARD would have sustained no more than "a few punctures and some serious bruises" had Echo been deployed. Although the dog was offered to the CITY by deputies on the scene, the CITY declined the offer to use Echo to subdue EDWARD.

Plaintiffs offered at trial two expert witnesses, the testimony of whom was not challenged as to qualifications, relevance or reliability. David Hall was the first expert, a licensed peace officer who had served as a sniper for the Carrollton [Texas] Police Department and an instructor of counter-sniper courses at the East Texas Police Academy. In Hall's opinion, the CITY should have had a policy regarding the use and deployment of a sniper:

> I think all agencies should have policies, especially when you get into specialized areas such as this in dealing with a sniper. You've got to have some checks and balances and controls over that.

The CITY had no formal policy on the use of a sniper. Hall interpreted the CITY'S "policy" that evening to be (1) challenge verbally, (2) try and gain verbal compliance, (3) if not, wait, (4) the remaining option is to shoot.

Plaintiffs additionally called Dean Kinney to the witness stand. Mr. Kinney was also an instructor at the East Texas Police Academy and had previously served as a municipal peace officer. At the time of his testimony, Kinney had been working in the field of law enforcement for twenty (20) years and was certified as a Master Peace Officer. Kinney testified that he was familiar with the standards outlined by the United States Supreme Court in *Tennessee v. Garner* [1] and *City of Canton v. Harris* [2] and

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[1] *Tennessee v. Garner*, 471 U.S. 1 (1985).

[2] *City of Canton v. Harris*, 489 U.S. 378 (1989).

that the CITY demonstrated deliberate indifference to the rights of EDWARD GONZALES in the manner in which it trained Sergeant Fackelman and BUNCH and allowed them to function on the night of the shooting death, October 29, 1994. As Kinney explained:

> Officer Fackelman was untrained in the techniques that needed to be employed out there. He was unfamiliar with the use of the sniper/counter sniper activity. He had no training as I can find in anything dealing with people that are emotionally distraught. There's no training. He has no policy to follow. He has no directives. He has no guidance, no guidelines. He has nothing out there. And to apply a common sense standard is asking for the disaster that happened to happen. . . . [He] has no control of the scene. I think he has made the decision to have this young man killed. He calls for the sniper, in fact, calls Bunch by name. . . . When Bunch arrives he provides him with little or no information concerning the events as they were prior to Bunch's arrival, and then he simply turns him lose without direction or guidance of any type.
>
> In this case, the deliberate indifference occurs when the City of Kerrville implemented the position of sniper/counter sniper. This individual carries the ability to terminate someone's life. He is completely different from the patrol officer armed with a handgun, whose handgun is specifically used for defensive measures. This weapon that Bunch carries and uses at this moment is used with one intent in mind, to terminate human life. In this case, when you have that type of responsibility . . . a policy must exist to insure that Bunch or anyone else occupying that position does not function independent of all authority within the police department.

5. Trial Court's Instructions to the Jury.

Judge Garcia charged the jury on plaintiffs' "Failure to Train" allegation, instructing the jury to find for the plaintiffs if (1) the CITY'S training program was inadequate to train its officers and employees to carry out their duties; (2) the need for more training or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the CITY could reasonably be said to have been deliberately indifferent to the need for additional training and (3) the failure to provide training was a cause of injury to the GONZALES FAMILY. App. 17a, 18a. The trial court instructed the jury that the Chief of Police was the policymaker for the CITY. App. 17a. Pursuant to the court's instructions, the jury found that the CITY had deprived EDWARD of his constitutional rights. The court further instructed the jury:

> If you find that one or both of the defendants are liable to plaintiffs, then you must determine an amount that is fair compensation for all of the plaintiffs' damages. Those damages are called compensatory damages.

App. 18a. The CITY did not object to this instruction. In conformity with the courts instructions, the jury awarded damages to the GONZALES FAMILY.

6. Trial Court Disregards Jury Findings.

Despite the jury's verdict, the trial court disregarded the jury's findings and entered a take nothing judgment. As the court set forth in the judgment:

> The jury having unanimously decided that defendant Donald H. Bunch did not violate the rights of Edward G. Gonzales, as alleged in the complaint, the Court hereby renders a take nothing judgment against the plaintiffs in favor of the defendants.

App. 8a. In it's order denying plaintiffs' Motion to Alter Judgment or, Alternatively, Motion for New Trial, the trial court relied upon this Court's opinion in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) and reiterated its finding that the jury's verdict in favor of BUNCH on the question of whether he used excessive force precludes the possibility that the GONZALES FAMILY could prevail on their claim against the CITY. App. 26a.

7. Fifth Circuit Opinion.

In a one page unpublished analysis of the issue, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the trial court, citing only to the *Heller* opinion for the proposition that a person that has suffered no constitutional injury at the hands of an individual police officer is precluded from establishing municipal liability for a violation of constitutional rights. The Fifth Circuit failed to distinguish the cases of *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994), *rehearing on other grounds*, 22 F.3d 1296 (3d Cir. 1994) (*en banc*); *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992); *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *Rivas v. Freeman*, 40 F.2d 1491 (11th Cir. 1991); *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986), *rev'd on other grounds*, 485 U.S. 112 (1988) and *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985). The Third, Eighth, Ninth, Tenth and Eleventh circuits have all decided cases similar to *Gonzales*, and all five circuits have found municipal liability independent of subordinate liability. Even though the Fifth Circuit had never decided this issue, the court deemed that its opinion in the case should not be published and should not serve as precedent. App. 1a. The Fifth Circuit subsequently denied the GONZALES FAMILY'S Petition for Rehearing En Banc. App. 10a.

REASONS FOR GRANTING WRIT OF CERTIORARI

The Fifth Circuit's decision conflicts with the decisions from the Third, Eighth, Ninth, Tenth and Eleventh circuits. Interestingly, even though the prevailing party moved the Fifth Circuit to reconsider its decision not to publish the opinion (App. 29a, 30a), the opinion remains unpublished. Such a decision should not protect the Fifth Circuit's opinion from the scrutiny of this Court. The Fifth Circuit's opinion exemplifies the confusion which results from a misapplication of *Heller* [3]—in those cases such as *Gonzales* where municipal liability is not predicated upon municipal ratification of unconstitutional subordinate conduct, but instead upon the independent claim of a city's failure (through its policymaker) to adequately train police officers—including but not limited to the police officer who causes the ultimate injury. This is an important question of constitutional law as applied through 42 U.S.C. § 1983 and affects the constitutional rights of all American citizens and residents. Moreover, this Court has not decided the specific issue raised in this appeal, making the issue ripe for review.

1. *Other Circuits: Independent Municipal Liability.*

The Third Circuit has specifically recognized that municipal liability exists independently from a subordinate officer's liability. *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3rd Cir. 1991), *cert. denied*, 503 U.S. 985 (1992). In *Simmons*, Philadelphia police officers arrested twenty-four (24) year-old Daniel Simmons for public in-

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[3] Although the Fifth Circuit relied exclusively on *Heller* to affirm the trial court's judgment and reject the jury's finding of municipal liability, the trial court, as well as the CITY, have cited the Seventh Circuit's opinion in *Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992) for the proposition that no municipal liability can exist in the absence of subordinate liability. App. 26a. To the extent that *Voida* stands for that proposition, it only serves to magnify the confusion among the circuits in their application of *Heller*.

toxication, transported him to the City's Sixth Police District and placed him in protective custody with the facility's turnkey, Officer Panati. *Id.* at 1049. Officer Panati placed Simmons alone in a jail cell, only to find him hanging from the bars of the cell approximately one and one-half hours after being incarcerated there. *Id.* at 1049-50. Simmons' mother filed a civil rights action pursuant to 42 U.S.C. § 1983 as a result of her son's death, seeking damages at trial against both Panati and the City of Philadelphia. *Id.* The jury determined that Panati, as BUNCH herein, did *not* but that the city *did* violate Simmons' constitutional rights. *Id.* at 1053-54. The issue on appeal was succinctly stated by the court:

> The crux of the city's contention is that the district court's section 1983 judgment against it cannot stand in light of the jury's finding that Panati inflicted no constitutional harm upon Simmons.

Id. At 1055. After conducting an extensive review of the applicable case authorities, the Third Circuit rejected the city's position and affirmed the trial court's judgment, finding no inconsistency in the jury's verdict because Panati, like BUNCH, was "not the city actor whose primary section 1983 liability must have been established as a predicate to subjecting the city to section 1983 liability for . . . a failure to train. . . ." *Id.* at 1063. Specifically addressing the *Heller* opinion, Judge Becker explained that *Heller* stands for the proposition that:

> the primary liability of a municipal *employee* under section 1983—as opposed to the primary liability of an official with policymaking authority—was a prerequisite to the section 1983 liability of the municipality itself.

Simmons, 947 F.2d at 1063 (emphasis original). Thus, where the primary liability rests with the policymaker, the

conduct of the municipal employee is not determinative of the municipality's Section 1983 exposure. *Id.* at 1063, 1064. This Court denied certiorari. *See also Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994) (*en banc*) (holding that municipal liability for a constitutional tort arises even if no individual police officer violates the Constitution).

Other circuits have followed the reasoning in *Simmons* and *Fagan*, drawing a distinction between the liability of the subordinate municipal employee and the municipality, acting by and through its policymaker. *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992); *Rivas v. Freeman*, 940 F.2d 1491 (11th Cir. 1991); *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986), *rev'd on other grounds*, 485 U.S. 112 (1988) and *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985).

The *Chew* opinion is also instructive on the issues presented herein. The plaintiff's claims against the City of Los Angeles were dismissed on summary judgment in *Chew*, but the plaintiff obtained a jury verdict for $13,000.00 against the police officer (coincidentally named "Bunch") who had released an attack dog ("Volker") to apprehend Chew. *Chew*, 17 F.3d at 1436. On appeal, the city urged the court to affirm summary judgment, based in part on a California statute that required the city to pay the judgment on behalf of Bunch. *Id.* at 1436-37. The city argued that the verdict and its subsequent satisfaction served to bar Chew's claim against the city, because the issues decided against Bunch were the same issues that would have to be decided against the city in order for Chew to hold the city liable for his injuries. *Id.* at 1437. The Ninth Circuit rejected this analysis. Although the jury did not find Bunch liable for

releasing the dog, Chew's claims against the city could go forward:

> A judgment that Bunch is not liable for releasing Volker, given all the circumstances, would not preclude a judgment that by implementing a policy of training and using the police dogs to attack unarmed, non-resisting suspects, including Chew, the remaining defendants caused a violation of Chew's constitutional rights. *Supervisorial liability may be imposed under Section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury.*

Id. at 1438 (emphasis added) (citations omitted). The court considered that the jury may have absolved Bunch because the city's policy "left him with no other means of apprehending the suspect that involved less risk of bodily injury to himself or the suspect." *Id.* at 1438. The jury in the instant case was faced with the same choice.

Prior to its decision in *Chew*, the Ninth Circuit found that a municipality may still be held liable for improper training even if the individual police officer who causes the physical injury is exonerated. *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992). In *Hopkins*, a claim was brought under 42 U.S.C. §§ 1983 and 1988 against Officer Andaya and the City of Oakland following the death of Jerry Stancill. *Id.* at 883, 884. Andaya claimed that he shot Stancill multiple times in self-defense, after Stancill had taken away Andaya's police baton and had begun to strike Andaya with it. *Id.* The trial court granted summary judgment on the basis that Andaya's use of force was reasonable and not excessive. *Id.* at 884, 885. After granting summary judgment in favor of Andaya, the trial court dismissed the claims against the City of Oakland as well. *Id.* at 888. In reversing, the Ninth Circuit's reasoning is instructive:

> We also reverse the grant of summary judgment in favor of Hart and the city. The district court dismissed the claims against the Chief of Police and the city on the theory that, if Andaya is not liable, neither are they. Because Andaya may be held liable under our disposition of the case, so may the other defendants. *In any event, the police chief and city might be held liable for improper training or improper procedure even if Andaya is exonerated, since they put an officer on the street who is so badly trained and instructed he lets his baton be taken away from him and then has to kill an unarmed civilian to save his own life.*

Id. (emphasis added).

The jury in the case at bar heard evidence that the CITY adopted policies to arrest armed persons such as EDWARD GONZALES that included only command, compliance and the use of deadly force but failed to include the use of a negotiator or the use of force less than deadly force, such as use of an available attack dog. No intermediate steps were adopted by the CITY, and no formal training was conducted, although evidence at trial supported a finding that such measures could well have resolved the situation without any loss of life. In the eyes of the jury below, BUNCH's conduct may not have risen to a constitutional deprivation, "given the fact that the procedures adopted by the city left him with no other means . . ." (*Chew*, 27 F.3d at 1438) or because his actions were the result of being "so badly trained and instructed" by his superiors (*Andaya*, 958 F.2d at 888). Under either factual scenario, BUNCH could be absolved of responsibility while the CITY would still be liable for a constitutional deprivation.

The Eighth, Tenth and Eleventh circuit courts have also issued opinions that are contrary to the Fifth Circuit opin-

ion below. In *Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172 (8th Cir. 1986), *rev'd on other grounds*, 485 U.S. 112 (1988), the preliminary issue addressed by the court concerned whether *Heller* precluded Praprotnik's "recovery against the city by reason of the jury's finding the individual defendants not liable." The court proceeded to distinguish *Heller*:

> Crucial to the result in *Heller* was the fact that the city's liability, if any, was solely derivative of the conduct of the named individual defendant Here, persons other than the named defendants . . . effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury.

Praprotnik, 798 F.2d at 1173, n.3. Similarly, the CITY police chief "effected city policy" in the instant case by failing to train the CITY'S police officers, bringing to fruition EDWARD'S ultimate injury—his death.

In *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985), the court upheld a finding of liability against the county even though the jury found that none of the five named individual defendants violated the civil rights of plaintiff's decedent. The widow and parents of Ronald James Garcia brought a 42 U.S.C. § 1983 action against Salt Lake County and county officials after Garcia was placed in a jail cell in an unconscious condition and subsequently died. *Id.* at 306. The plaintiffs offered testimony at trial that the county failed to adequately assess the medical condition of Garcia, and failed to provide him with reasonable medical care. *Id.* The jury rendered a special verdict against the county but in favor of the individual defendants. *Id.* at 305. The verdict form utilized in *Garcia* is strikingly similar to Special Interrogatory No. 1 in the instant case. *Id.* at 309, n.6. After concluding that the jury's finding against the county was supported by sufficient evidence, the court addressed the

county's contention that a finding of unconstitutional conduct by an officer/employee of the county is a prerequisite to county liability. *Id.* at 308, 309. The Tenth Circuit relied upon this Court's holding in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) to explain how the county could be liable even though the individuals who were responsible for the care and supervision of Garcia were not liable:

> *Monell* does not require that a jury find an individual defendant liable before it can find a local government body liable. The language of Section 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." Although the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights. . . .

Garcia, 768 F.2d at 310 (citations omitted).

In *Rivas v. Freeman*, 940 F.2d 1491 (11th Cir. 1991), the plaintiff established that although the sheriff was not personally involved in the arrest, he was liable for the plaintiff's injuries because of a lack of "well established policies and procedures" which resulted in plaintiff's constitutional claims. Similar to the facts of the instant case, the *Rivas* plaintiff failed to prove a constitutional violation by the individual defendants. Nevertheless, the court of appeals upheld the trial court's judgment against the policymaker.

As has been set forth above, *none* of these cases were cited, discussed or distinguished by the Fifth Circuit in formulating its holding herein.

2. *Fifth Circuit Misunderstood Basis for "Constitutional Injury."*

Moreover, the Fifth Circuit identifies the constitutional injury in this case to be "the alleged excessive force used by Officer Bunch." App. 4a. Because the jury found that BUNCH had not deprived EDWARD of his constitutional rights, the court below concluded that the claims against the CITY for "failure to train" must fail as a matter of law. App. 4a. This reasoning is flawed and contrary to the holdings by this Court in *Monell*[4] and *City of Canton v. Harris*[5] because it assumes that all of plaintiffs' constitutional claims are dependent upon a theory that BUNCH'S conduct is the only possible predicate for municipal liability. That is not the burden placed upon plaintiffs in this type of case. The constitutional injury is the DEATH of EDWARD GONZALES. The liability of the CITY is dependent upon a finding that the CITY'S failure to train *its officers in the proper manner and method of responding to an emotionally distraught young man who is armed, potentially dangerous but contained* "amounts to deliberate indifference to the rights of persons with whom the police come in contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

> The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inade-

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4 436 U.S. at 694, 695.

5 489 U.S. 378, 388 (1989).

> quacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390-91. The specific circumstances under which a municipality may be held liable under 42 U.S.C. § 1983 were further clarified by Justice O'Connor, speaking for the majority, in *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989):

> As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. . . . Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.

(emphasis original) (citations omitted).

3. *Police Chief as Policymaker Caused Constitutional Deprivation.*

In the case at bar, the trial court determined that the Chief of Police was the policymaker for the CITY, and so instructed the jury without objection from the CITY. App. 17a. As the official who had "the power to make official policy" with regard to the deployment and utilization of a sniper, as well as the use of available, less ag-

gresive alternatives (including a negotiator or a police dog), the police chief's conduct was subject to scrutiny to determine whether his decisions "caused the deprivation of rights at issue." Through evidence at trial of a deficiency in training—a failure to adequately train CITY police officers (including Fackelman, the commander on the scene) as to the proper procedures to follow in de-escalating an emotionally charged situation, in selecting progressive degrees of engagement and in properly deploying and utilizing a sniper—that was closely related to the injury—the death of EDWARD GONZALES—the GONZALES FAMILY established the CITY'S liability (apart from any liability that may attach to BUNCH) for a constitutional injury. *City of Canton*, 489 U.S. at 391.

The Fifth Circuit cited *Monell*, but failed to recognize that the purpose behind requiring a "policy" to establish municipal (as opposed to individual) liability "was intended to distinguish those acts of employees of the municipality. . . ." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). *Pembaur* further stands for the proposition that a *single decision* by municipal policymakers can result in municipal liability, under appropriate circumstances. *Id.* at 480. The CITY police chief, testifying in his capacity as a policymaker, admitted that there was no training of the police officers on the scene in alternatives of less than deadly force and no training of scene commanders as to when or how to use a sniper. Thus, the conscious and deliberate decisions of the CITY'S policymaker foreseeably and inevitably resulted in the shooting of EDWARD GONZALES and his subsequent death.

4. *Fifth Circuit Misapplied* Heller *Opinion.*

The Fifth Circuit cites only to *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (*per curiam*) for the proposition that if BUNCH did not deprive EDWARD of his constitutional rights, then neither did the CITY.

App. 4a. *Heller* is *not* the *Gonzales* case. *Heller* was pre-*Canton*, decided on summary disposition without affording the parties "prior notice or an opportunity to file briefs on the merits." *Heller*, 475 U.S. at 800. The municipality in *Heller* was sued—not because of a failed policy—but solely because the plaintiff claimed the City of Los Angeles ratified the subordinate officers' use of excessive force, which the jury found was not excessive. *Id.* at 799. Those are not the facts of this case. In this case, the GONZALES FAMILY has presented evidence that the CITY, acting through its policymaker (Chief of Police), failed to adequately train its police officers, resulting in an exacerbation of a stressful and emotional situation which culminated in the shooting death of EDWARD GONZALES. The jury's verdict is not inconsistent and is supported by the law in the Third, Eighth, Ninth, Tenth and Eleventh Circuits. The time is ripe for the Supreme Court to clarify the difference between municipal and subordinate officer liability in Fourth Amendment unreasonable seizure cases. This case affords the Court that opportunity.

CONCLUSION

For the reasons stated herein, the GONZALES FAMILY respectfully prays that the Court GRANT this Petition for Writ of Certiorari and set the case for briefing and argument.

Respectfully submitted,

LES MENDELSOHN *
RICKY J. POOLE
LES MENDELSOHN & ASSOCIATES, P.C.
1100 Weston Centre
112 East Pecan Street
San Antonio, Texas 78205
(210) 222-2271
Attorneys for Petitioners

*** Counsel of Record**

APPENDICES

APPENDIX A

[Filed Dec. 20, 1999]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51047

PAUL GONZALES, SR., individually and as personal representatives of the Estate of Edward G. Gonzales, deceased; ELIZABETH GONZALES, individually and as personal representatives of the Estate of Edward G. Gonzales, deceased,

Plaintiffs-Appellants,

v.

CITY OF KERRVILLE, TEXAS; DONALD H. BUNCH, Individually and in his Official Capacity

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-96-CV-998)

Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.

PER CURIAM: *

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

I. PROCEDURAL AND FACTUAL BACKGROUND

This appeal arises out of a § 1983 suit brought by the parents of Edward Gonzales (the Gonzales Family). Edward Gonzales was shot in the chest and killed by Donald Bunch, a sniper with the City of Kerrville Police Department (Police Department), on October 29, 1994 in Kerrville, Texas (the City). This lawsuit was filed on September 20, 1996, against the City and Officer Bunch by the Gonzales family. At trial, the Gonzales Family alleged that the City's failure to adequately train its police officers to handle the use of snipers; its failure to utilize non-deadly options such as negotiation or attack dogs; and the failure of Bunch to stay within the chain of command was the cause of their son's death. Additionally, they alleged that Fackelman's lack of formal training in the use of snipers or in the proper procedures for confronting emotionally disturbed persons was a cause of their son's death.

As part of the pretrial proceedings, the Gonzales family filed a memorandum requesting that the district court exclude "any evidence submitted for the purposes of establishing Bunch's objective reasonableness beyond the information of which Bunch was aware at the time he shot Edward Gonzales." However, the district court allowed the "facts surrounding Gonzales' conduct prior to the shooting, if testified to by witnesses subject to cross-examination . . . ." As a result, various facts beyond what Bunch knew at the time he shot Gonzales were brought before the jury, including that Gonzales had hit his cousin with the butt of his rifle earlier on the day he died, and the fact that a bullet shattered the window of a nearby residential complex in which a ten-year-old girl resided. The district court instructed the jury to disregard the testimony regarding Gonzales hitting his cousin.

Especially important are the following facts surrounding the jury's allegedly inconsistent verdict. At trial, the district court charged the jury on the "Failure to Train" allegation, stating that a verdict would be for the Gonzales Family if the jury found that (1) "the City of Kerrville's training program was inadequate to train its officers and employees to carry out their duties" and (2) that "the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city of Kerrville can reasonably be said to have been deliberately indifferent to the need for such training."

However, the Special Interrogatories instructed the jury not to address the issue of damages unless they found that Bunch had deprived Gonzales of his constitutional rights.[1] The jury responded to the Special Interrogatories by finding that the City of Kerrville had violated Edward Gonzales's constitutional rights even though Bunch had not. The jury awarded the Gonzales family $100,000. Despite the jury's verdict, the district court entered a take nothing judgment in favor of the City of Kerrville, finding that once the jury decided that defendant Donald H. Bunch did not violate the rights of Edward G. Gonzales,

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[1] The special verdict form submitted to the jury was as follows:

Special Interrogatory No. 1:

Do you find from a preponderance of the evidence that either the City of Kerrville or Donad H. Bunch deprived Edward Gonzales of his constitutional rights as defined in this Court's instructions?

ANSWER "YES" OR "NO" with respect to each Defendant.

City of Kerrville _____

Sgt. Donald Bunch _____

If you have answered "Yes" to Special Interrogatory No. 1 with respect to Donald Bunch, then answer Special Interrogatory No. 2. If you answered "No" to Special Interrogatory No. 1 with respect to Donald Bunch, then do not answer Special Interrogatory No. 3 (regarding damages).

there was no basis of liability against the City of Kerrville. The Gonzales Family filed a Motion to Alter Judgment and an alternative Motion for New Trial, both of which were denied by the district court. This appeal followed.

II. DISCUSSION

The Gonzales Family alleges two basis of error. First they argue that the district court erred in rendering a take-nothing verdict against them and, in the alternative, denying their motions for a new trial or to alter the judgment. Second, they challenge several of the district court's evidentiary rulings. Finding no error, we AFFIRM the district court's verdict and evidentiary rulings.

1. The Verdict in Favor of the City.

The district court corectly granted a verdict in favor of the City. To prevail on a § 1983 suit against the City, the Gonzales Family must prove a) a constitutional injury, here the alleged excessive deadly force by Officer Bunch, and b) that the City authorized or maintained a custom of approving of the unconstitutional conduct. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Thus the claim against the city must fail if Gonzales' constitutional rights were not violated.

The claim aginst the City fails as a matter of law. Only excessive force was alleged as a violation of Gonzales' Constitutional rights. The only individual alleged to have used excessive force was Bunch, the officer who shot Gonzales. Thus, the only violation allegedly caused by the City's "failure to train" or by the alleged deficiencies of Sergeant Fackelman's policies regarding the use of snipers, was Bunch's shooting of Gonzales. Since the jury found, in its answer to the first interrogatory, that the shooting was not a violation of Gonzales' constitu-

tional rights, it follows that the City's alleged failure to train caused no violation of constitutional rights. *See Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (*per curium*) (stating that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite besides the point.") Thus, there was no violation of constitutional rights on which to base a finding of municipal liability and the City is entitled to judgment as a matter of law under both *Monell* and *Los Angeles v. Heller*.

2. The Evidentiary Rulings

The district court allowed into evidence the "facts surrounding Gonzales' conduct prior to the shooting, if testified to by witnesses subject to cross-examination . . . ." As a result, various facts about Gonzales were brought before the jury that were not known to Bunch at the time that he shot Gonzales. These facts included that Gonzales had hit his cousin several times with the butt of a rifle on the day that Gonzales was shot dead, and the fact that a bullet shattered the window of a nearby residential complex in which a ten year old girl resided. The district court instructed the jury to disregard the testimony regarding Gonzales hitting his cousin. This court reviews the district court's admission of evidence for abuse of discretion. *Jon-T Chemicals, Inc.* v. *Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983) (noting that the admission of evidence is within the sound discretion of the district court). An error in the admission of evidence is reversible only if the evidence complained of affected a substantial right of the Gonzales Family. *See* FED.R. EVID. 103(a).

The Gonzales Family argues that the evidence in question is not probative of whether Officer Bunch's actions were reasonable and that the evidence should thus be excluded given its prejudicial value, i.e. it tends to give the jury the impression that Gonzales was off on a violent rampage and that he was a threat to little girls. The City responds that the Gonzales' "opened the door" when they had Paul Gonzales, Jr., Edward Gonzales's brother, take the stand to testify about Edward Gonzales' "peaceful nature." During cross-examination, the City asked Paul Gonzales, Jr. about Edward Gonzales having attacked him on the day in question as well as his having threatened to kill their father. Given that the Gonzales' opened the door to the testimony, and that the district court limited the prejudicial impact of such testimony with a limiting instruction, there is no abuse of discretion.

The Gonzales' complain about the admission of the testimony of one Ranger Buckaloo who testified, upon cross-examination in answer to questions posed by the Gonzales', that certain individuals at a nearby apartment building, including a 10 year old girl, were at risk of being hit by the bullets shot by Gonzales. Given that the Gonzales' counsel asked the question but did not like the answer, there was no abuse of discretion in allowing the answer into evidence.

Finally, the Gonzales' complain about the admission of various exhibits, including a diagram of the Dam and a 45 minute tape of the incident in question, including officers' comments about bullets whizzing past their heads. The City points out that the Gonzales' allegations put at issue the reasonableness of how the City's officers were trained and how the City responded to the incident in question. The City argues that the 45 minute tape describes how the Police Department responded to the in-

cident and portrays the professional conduct of a department alleged to have been improperly trained. Given the strong relevance of this evidence to issues raised by the Gonzales' allegations of poor training, admission of this evidence was not an abuse of discretion.

III. CONCLUSION

The verdict in favor of the City, as well as all the challenged evidentiary rulings, are hereby AFFIRMED.

APPENDIX B

[Filed Aug. 25, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-6-CA-998 HG

PAUL GONZALES, SR. and ELIZABETH GONZALES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD G. GONZALES, DECEASED,
Plaintiffs,

v.

THE CITY OF KERRVILLE, TEXAS; and DONALD H. BUNCH, IN HIS OFFICIAL CAPACITY,
Defendants.

JUDGMENT

On this day, the Court considered the answers to Special Interrogatory Number 1 provided by the jury upon conclusion of deliberations. The jury having unanimously decided that defendant Donald H. Bunch did not violate the rights of Edward G. Gonzales, as alleged in the compaint, the Court hereby renders a take nothing judgment against the plaintiffs in favor of the defendants. All issues having been resolved, the Clerk is ordered to close this case.

Signed on this the 25th day of August, 1998.

/s/ H. F. Garcia
H. F. GARCIA
United States District Judge

APPENDIX C

[Filed Jan. 24, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51047

PAUL GONZALES, SR., Individually and as personal representatives of the Estate of Edward G. Gonzales, deceased; ELIZABETH GONZALES, Individually and as personal representatives of the Estate of Edward G. Gonzales, deceased,

Plantiffs-Appellants

v.

CITY OF KERRVILLE, TEXAS; DON BUNCH
Individually and in his Official Capacity,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING EN BANC

Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

APPENDIX D

[Transcript of Court's Instructions to the Jury]

* * * *

[1061] THE COURT: Good morning. All right.

All right. Ladies and gentlemen of the jury, I'm going to read the Court's Instructions to the Jury, and you'll follow along as I read.

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you, the jury, are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

[1062] After I instruct you on the law the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Your answers and your verdict must be unanimous.

You must answer all questions from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of the evidence just means the amount of evidence that persuades you that a claim is more likely so than not so.

In determining whether any fact has been proved by a preponderance of the evidence in the case you may, unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called them, and

all exhibits received in evidence, regardless of who may have produced them.

You will recall that during the course of this trial I instructed you to disregard certain testimony. That instruction remains in effect, and you should not consider for any purpose testimony that I instructed you to disregard.

In determining the weight to give to the testimony of a [1063] witness you should ask yourselves whether there was evidence tending to prove that the witness testified falsely concerning some important fact or whether there was evidence that at some other time the witness said or did something or failed to say or do something that was different from the testimony the witness gave before you during the trial.

You should keep in mind of course that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So if a witness has made a misstatement you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

While you should consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

The testimony of a single witness may be sufficient to prove any fact even if a greater number of witnesses may

testify to the contrary, if, after considering all the other evidence, you [1064] believe that single witness.

There are two types of evidence that you may consider in properly finding the truth as to the facts in this case. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances that indicates the existence or non-existence of certain other facts.

As a general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field—he is called an expert witness—is permitted to state his opinion on those technical matters. However, you are not required to accept that opiinon. And as with other witnesses, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely on the opinion of an expert witness you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly as an expert witness and his income from such testimony represents a significant portion of his income, or that he has an interest in [1065] the case, or by whom he is regularly employed.

The plaintiffs in this action claim the defendants, Donald H. Bunch and the City of Kerrville, violated Edward Gonzales's constitutional rights when Donald Bunch used excessive and unnecessary force in arresting Edward Gonzales. As a result of the defendant's actions, the plaintiffs claim that they suffered injury for which they seek damages.

The defendants deny that any of Donald Bunch's actions during the time in question violated Edward Gonzales's constitutional rights. The defendants claim that Donald Bunch was acting in good faith and with probable cause. The defendants further claim that Donald Bunch was not guilty of any fault or wrongdoing in regard to the incident sued upon.

Section 1983 of Title 42 of the United States Code provides that any citizen may seek redress in this court by way of damages against any person who, under color of state law or custom, intentionally deprives that citizen of any rights, privileges, or immunities secured and protected by the constitution or laws of the United States.

In order to prove their claim under this statute, the plaintiffs must establish by a preponderance of the evidence each of the following elements;

One, the defendants intentionally committed acts which operated to deprive Edward Gonzales of a right secured by the Constitution of the United States.

[1065] Two, that defendants acted under color of authority of the State of Texas.

Three, that the defendants' acts were the legal cause of the plaintiffs' damages.

In this case you are instructed that the defendants were acting under color of state law at the time of the acts complained of. The plaintiffs allege that the defendants used excessive force in arresting Edward Gonzales.

United States citizens are protected against the use of excessive force by the Fourth Amendment of the Constitution. In order to prove that the defendants used excessive force in violation of the Fourth Amendment the plaintiffs must prove by preponderance of the evidence:

1. Some harm that

2. resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was,

3. objectively unreasonable in light of the facts and circumstances at the time.

If the plaintiffs fail to prove any of these elements you must find for the defendants.

Some of the things you may want to consider in determining whether the defendants used excessive force are; the extent of the injuries suffered, the need for the application of force, the relationship between the need and the amount of force used, [1067] the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response.

Injuries which result from, for example, an officer's use of force to overcome resistance, do not involve constitutionally protected interests. An officer's use of excessive force does not give constitutional protection against injuries that would have occurred absent the excessive force.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight. The nature of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation.

This reasonableness inquiry is an objective one. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. In determining the reasonableness of Donald Bunch's conduct you are to consider only those facts known to him at the time.

If you find the plaintiffs have proven their claim you must then consider the defendant's defense that his conduct was objectively reasonable in light of the legal rules

clearly [1068] established at the time of the incident in issue, and that he is therefore not liable.

Police officers are presumed to know about the clearly established constitutional rights of citizens. Here the right involved is a right of the people to be secure in their persons against unreasonable seizures, including the use of excessive force.

If after considering the scope of discretion and responsibility generally given to police officers in the performance of their duties, and after considering all of the surrounding circumstances of the case as they would have reasonably appeared at the time of the arrest, you find from a preponderance of the evidence that plaintiffs have proved either that Donald Bunch was plainly incompetent or that he knowingly violated the law regarding Edward Gonzales's constitutional rights, you must find for the plaintiffs. If, however, you find that the defendant had a reasonable belief that his actions did not violate the constitutional rights of Edward Gonzales, then you cannot find him liable even if Edward Gonzales's rights were in fact violated as a result of the defendant's objectively reasonable actions.

The plaintiffs must also prove by a preponderance of the evidence that the act or failure to act by the defendants was a cause-in-fact of the damage the plaintiffs suffered. An act or failure to act is a cause-in-fact of an injury or damages if it [1069] appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damages.

The plaintiffs must also prove by preponderance of the evidence that the act or failure to act by the defendants was a proximate cause of the damage plaintiffs suffered. An act or omission is a proximate cause of the plaintiffs' injuries or damages if it appears from the evidence that the injury or damage was a reasonably foreseeable consequence of the act or omission.

In addition to their claims against Donald Bunch whom the plaintiffs claim violated Edward Gonzales's constitutional rights, the plaintiffs are suing superior officials, in this case the City of Kerrville. To recover against a superior official, the plaintiffs must show that the City of Kerrville had a legal duty to act to prevent the misdeeds of Donald Bunch, and the City of Kerrville's failure to act amounted to deliberate indifference of Edward Gonzales's rights.

The plaintiffs claim that the City of Kerrville, a municipality, is liable for the alleged constitutional deprivations. A city is liable for the deprivation of a constitutional right if the deprivation was pursuant to governmental custom, policy, ordinance, regulation, or decision. Therefore, if you find that the plaintiffs were injured as the proximate or legal result of the City of [1070] Kerrville's policy, custom, ordinance, regulation, or decision, whether made by its lawmakers or by those officials who acts may fairly be said to represent official policy, the city itself will be responsible.

The chief of police is an official whose acts constitute final official policy of the City of Kerrville. Therefore, if you find that the acts of the chief of police deprived Edward Gonzales of his constitutional rights, the City of Kerrville is liable for such deprivation.

Furthermore, the plaintiffs claim that Edward Gonzales's death was the result of the City of Kerrville's failure to properly train its officers. Your verdict will be for the plaintiffs only if you find; first, the City of Kerrville's training program was inadequate to train its officers and employees to carry out their duties.

And, second, the need for more training or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the City of Kerrville can reasonably be said

to have been deliberately indifferent to the need for such training.

And third, a failure to provide training was a cause of injury to the plaintiffs.

If you should find for the plaintiffs and against the defendant or defendants then you must decide the issue of damages.

[1071] If the plaintiffs have proven their claim against the defendants by a preponderance of the evidence, you must determine the damages to which the plaintiffs are entitled. You should not interpret the fact that I have given instructions about the plaintiffs damages as an indication in any way that I believe that the plaintiff should or should not win this case. It is your task first to decide whether the defendants are liable. I'm instructing you on damages only so that you will have a guidance in the event you decide the defendants are liable and that the plaintiffs are entitled to recover money from the defendants.

If you find that one or both of the defendants are liable to the plaintiffs, then you must determine an amount that is fair compensation for all of the plaintiff's damages. Those damages are called compensatory damages. The purpose of compensatory damages is to make the paintiffs whole; that is, to compensate the plaintiffs for the damage that the plaintiffs have suffered.

Compensatory damages are not limited to expenses that the plaintiffs may have incurred because of their injury. If the plaintiffs win they are entitled to compensatory damages for Edward Gonzales's physical injury, pain and suffering, mental anguish, shock, and discomfort that he had suffered because of the defendants' conduct. Additionally, each plaintiff is entitled to compensatory damages for lost support and services, [1072] medical and funeral expenses, mental pain and suffering, and loss of

care, society and companionship they have suffered as a result of Edward Gonzales's death.

You may award compensatory damages only for injuries that the plaintiffs prove were proximately caused by the defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of plaintiffs' damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendants. You should not award compensatory damages for speculative injuries, but only for those injuries which the plaintiffs have actually suffered or that the plaintiffs are reasonably likely to suffer in the future.

If you decide to award compensatory damages you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiffs prove the amount of the losses with mathematical precision, but only with such definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

When you retire to the jury room to deliberate on your verdict you may take this charge with you, as well as exhibits [1073] which the Court has admitted into evidence. Select your foreperson and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that the Court has given you about and on your conduct during the trial. After you have reached your unanimous verdict, your foreperson is to fill in on the form your answers to the questions.

Do not reveal your answers until such time as you are discharged, unless otherwise directed by me. You should

never disclose to anyone, not even to me, your numerical division on any question.

If you want to communicate with me at any time please give a written message or question to the bailiff, who will bring it to me. I will then respond as promptly as possible, either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question.

After you have reached a verdict you are not required to talk with anyone about the case unless the Court orders otherwise.

Now you should have with you special interrogatories and we'll review those.

Special Interrogatory Number 1. Do you find from a preponderance of the evidence that either the City of Kerrville or Donald H. Bunch deprived Edward Gonzales of his [1074] constitutional rights as defined in the Court's instructions?

Answer "yes" or "no" with respect to each defendant.

And there's a blank for your answer for the City of Kerrville and for Donald H. Bunch, and then some instructions.

If you have answered "yes" to Special Interrogatory Number 1 with respect to Donald H. Bunch, then answer Special Interrogatory Number 2. If you have answered "no" to Special Interrogatory Number 1 with respect to Donald H. Bunch, then do not answer Special Interrogatory Number 3.

Special Interrogatory Number 2. With respect to the conduct of Donald H. Bunch on the occasion in question, do you find from a preponderance of the evidence that a reasonable peace officer could have believed his conduct to be lawful in light of clearly established law and the information possessed by the peace officer at the time the conduct occurred?

Answer "yes" or "no," and there's a blank for your answer. And there follows some instructions.

If you've answered "yes" to Special Interrogatory Number 1 with respect to the City of Kerrville, then answer Special Interrogatory Number 3 with respect to the City of Kerrville only if you have answered "no" to Special Interrogatory Number 2. Otherwise, do not answer Special Interrogatory Number 3 with respect to the City of Kerrville. If you have answered "no" to Special Interrogatory Number 2, then answer Special Interrogatory Number 3 with respect to Donald H. Bunch. [1075] Otherwise, do not answer Special Interrogatory Number 3 with respect to Donald H. Bunch.

Special Interrogatory Number 3. What sum of money, if any, do you find from a preponderance of the evidence will reasonably compensate the plaintiffs for the damages resulting from the death of Edward Gonzales? Note: You may apportion all damages between the two plaintiffs. Answer in dollars and cents or zero. And there's a blank for your answer for Paul Gonzales and Elizabeth Gonzales.

Have the foreperson sign and date this special interrogatory form and give it to the Court security officer.

We will now, members of the jury, hear the arguments by the lawyers. The plaintiff has the burden of proof; therefore, the plaintiff has a right to start the argument and to close the argument. Mr. Mendelsohn.

(Closing arguments made by counsel for both parties, jury deliberations had, and verdict rendered)

APPENDIX E

[Filed Aug. 24, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-96-CA-998 HG

PAUL GONZALES, SR. and ELIZABETH GONZALES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD G. GONZALES, DECEASED,
Plaintiffs,

v.

THE CITY OF KERRVILLE, TEXAS;
and DONALD H. BUNCH,
IN HIS OFFICIAL CAPACITY,
Defendants.

SPECIAL INTERROGATORIES

Special Interrogtaory No. 1

1. Do you find from a preponderance of the evidence that either the City of Kerrville or Donald H. Bunch deprived Edward Gonzales of his constitutional rights as defined in the Court's instructions?

Answer "Yes" or "No" with respect to each defendant.

Answer: The City of Kerrville YES

Donald H. Bunch NO

If you have answered "Yes" to Special Interrogatory No. 1 with respect to Donald H. Bunch, then answer Spe-

cial Interrogatory No. 2. If you answered "No" to Special Interrogatory No. 1 with respect to Donald H. Bunch, then do not answer Special Interrogatory No. 3.

Special Interrogatory No. 2

2. With respect to the conduct of Donald H. Bunch on the occasion in question, do you find from a preponderance of the evidence that a reasonable peace officer could have believed his conduct to be lawful in light of clearly established law and the information possessed by the peace officer at the time the conduct occurred?

Answer "Yes" or "No."

Answer: _____

If you have answered "Yes" to Special Interrogatory No. 1 with respect to the City of Kerrville, then answer Special Interrogatory No. 3 with respect to the City of Kerrville only if you have answered "No" to Special Interrogatory No. 2. Otherwise, do not answer Special Interrogatory No. 3 with respect to the City of Kerrville. If you have answered "No" to Special Interrogatory No. 2, then answer Special Interrogatory No. 3 with respect to Donald H. Bunch. Otherwise, do not answer Special Interrogatory No. 3 with respect to Donald H. Bunch.

Special Interrogatory No. 3

3. What sum of money, if any do you find from a preponderance of the evidence would reasonably compensate the plaintiffs for their damages resulting from the death of Edward Gonzales? (Note: You may apportion all damages between the two plaintiffs.)

Answer in dollars and cents or zero.

Answer: Paul Gonzales: $50,000.00

Elizabeth Gonzales: 50,000.00

Have the Foreperson sign and date this Special Interrogatory form and give it to the Court security officer.

We, the jury, unanimously answered the preceding question(s) by a preponderance of the evidence.

/s/ [Illegible] Date: 8/24/98
Foreperson of the Jury

APPENDIX F

[Filed Sep. 24, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-96-CA-998 HG

PAUL GONZALES, SR. and ELIZABETH GONZALES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD G. GONZALES, DECEASED,
Plaintiffs,

v.

THE CITY OF KERRVILLE, TEXAS; and DONALD H. BUNCH, IN HIS OFFICIAL CAPACITY,
Defendants.

ORDER

On this day, the Court considered Plaintiffs' Motion to Alter Judgment or, Alternatively, Motion for New Trial and Brief and the response filed by the Defendants. Having reviewed the same, and the authorities cited therein, the Court is of the opinion that the motions should be denied.

I. Motion to Alter Judgment

In *Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d (1986) (*per curiam*), the Supreme Court addressed a similar situation in which after a jury found that a police officer had not used excessive force

when apprehending a suspect, the trial court dismissed the claim against the city because once "the police officer had been exonerated by the jury there could be no basis for the assertion of liability against the city or the persons constituting its Police Commission." *Id.* at 798, 106 S.Ct. at 1572. The Supreme Court agreed with the trial court, holding "this was an action for damages, and neither *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.* at 799, 106 S.Ct. at 1573. The Court added "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Id.* Thus, to prevail on a *Monell* claim, a plaintiff must establish (1) that he has suffered a constitutional injury, e.g., he was a victim of excessive force by a police officer, and (2) that the city authorized or maintained a custom of approving of the unconstitutional conduct. *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994).

Here, the jury verdict in favor of Officer Bunch on the question of whether he used excessive force precludes the possibility that the Gonzales family could prevail on their *Monell* claim. *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573; *Thompson*, 33 F.3d at 859; *see also Hahn v. Kenner*, 984 F.Supp. 424, 435 (E.D.La. 1997) ("[a] municipal corporation can not be held liable 'based on the actions of one of its officers when in fact the jury has concluded that the officer has inflicted no constitutional harm' ") (citing *Heller*); *Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992) ("because [the officer] did not vio-

late [the plaintiff's] constitutional rights, there is no basis for liability against the other defendants either"). (citing *Heller*); *Myatt v. City of Chicago*, 816 F.Supp. 1259, 1264 (N.D.Ill 1992) ("[i]f the individual officers are not held liable, the City cannot be held liable under a *Monell* claim") (citing *Heller*).

However, the Court is aware that some courts have argued that *Heller* is to be given a narrow reading, and should not be extended beyond those instances when the city's liability is based upon its responsibility for the particular officer's allegedly unconstitutional conduct. *Garrison v. City of Texarkana*, 910 F.Supp. 1196, 1204 (E.D. Tex. 1995) (citations omitted). If the constitutional violation resulted from enforcement of municipal policy or custom, then the municipality will be liable for its wrongs. *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985); *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985).

Plaintiffs seek to impose liability on the City of Kerrville for inadequately training its officers and adopting a "wait and shoot" policy. Plaintiffs allege that the City of Kerrville tolerates the use of excessive and unreasonable force to such an extent that it has become the custom of the department. These allegations against the City of Kerrville are separate and distinct from any allegations based upon responsibility for Officer Bunch's actions.

Yet, the Fifth Circuit has held that proof of a single violent incident is ordinarily insufficient to hold a municipality liable for inadequate training. *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998). Furthermore, the plaintiffs must demonstrate "at least a pattern of similar incidents in which the citizens were injured . . . to establish the official policy requisite to municipal liability under section 1983." *Id.* at 798 (citing *Rodriguez v.*

Avita, 871 F.2d 552, 554-55 (5th Cir. 1989) (internal quotation and citation omitted)). Here, there is no evidence that the City of Kerrville had actual knowledge of a pattern, or series of allegations, of excessive force on the part of its officers, and in particular Officer Bunch. The only other incident similar to the one in question, involving a gunman in a Whataburger restaurant, was resolved peacefully. Therefore, even in the alternative, the Gonzales family can not prevail.

II. Motion for New Trial

The Court agrees with the Defendants that many of the instructions now complained of by the Plaintiffs were contained in the Joint Pretrial Order and the Fifth Circuit Pattern Jury Instructions (Civil), and refuses to grant the motion on that basis.

III. Conclusion

Therefore, for the reasons cited above, the Court hereby ORDERS that Plaintiffs' Motion to Alter Judgment or Alternatively, Motion for New Trial and Brief be DENIED.

Signed this 24th day of September, 1998.

/s/ H. F. Garcia
H. F. GARCIA
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 98-51047

PAUL GONZALES, SR., Individually and as personal representatives of the Estate of Edward G. Gonzales, deceased; ELIZABETH GONZALES, Individually and as personal representatives of the Estate of Edward G. Gonzales, deceased,

Plaintiff-Appellants

v.

CITY OF KERRVILLE, TEXAS; DON BUNCH, Individually and in his Official Capacity,

Defendants-Appellees

DEFENDANT/APPELLEES'
MOTION TO RECONSIDER PUBLICATION

TO THE HONORABLE COURT OF APPEALS FOR THE FIFTH CIRCUIT:

NOW COMES the CITY OF KERRVILLE and OFFICER DONALD BUNCH, Defendants/Appellees in the above referenced appeal and pursuant to Fifth Circuit Rule 47.5.2 respectfully requests the Court to reconsider

its decision that said opinion not be published and respecfully requests that said opinion be published and in support thereof, would show unto the Court the following:

I.

Defendants/Appellees submit to the Court that pursuant to the Fifth Circuit Rule 47.5.1, Criteria for Publication, that said opinion explains the history of existing decisional or enacted law concerning the United States Supreme Court case of *Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam). Said opinion is only the second opinion in the Fifth Circuit discussing *Los Angeles v. Heller.*

II.

Defendants/Appellees further assert unto the Courts that the opinion's evidentiary rulings concerning this 42 U.S.C § 1983 case stands as a paradigm. There is a paucity of cases concerning evidentiary rulings under 42 U.S.C. § 1983 and this opinion would serve as significant precedent.

WHEREFORE, PREMISES CONSIDERED Defendants/Appellees CITY OF KERRVILLE AND DONALD H. BUNCH requests the Court to reconsider its decision on publication and publish said opinion.

Respectfully submitted,

LAW OFFICES OF CHARLES S. FRIGERIO
A Professional Corporation
Riverview Towers
111 Soledad, Suite 840
San Antonio, Texas 78205
(210) 271-7877
(210) 271-0602 Telefax

By: /s/ Charles S. Frigerio
CHARLES S. FRIGERIO
State Bar No. 07477500

Attorneys for Appellees
City of Kerrville and
Officer Donald Bunch